EXHIBIT “A”

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ISOJON KHUSENOV,

Plaintiff,

-versus-

PROKRAFT INC., ET AL,

Defendants.

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21-CV-3703(BMC)

United States Courthouse
Brooklyn, New York

May 02, 2022
2:45 p.m.

TRANSCRIPT OF CIVIL CAUSE FOR MOTION HEARING
BEFORE THE HONORABLE BRIAN M. COGAN
UNITED STATES DISTRICT JUDGE

APPEARANCES

For the Plaintiff: LAW OFFICES OF ALEXANDER BESPECHNY
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Brooklyn, New York 11223
BY: GIL ZOHAR, ESQ.

For the Defendant: O'CONNOR REDD ORLANDO, LLP
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BY: CARMEN VASQUEZ, ESQ.

For the Third-Party: CONGDON, FLAHERTY, O'CALLAGHAN
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BY: THOMAS M. EVANS, ESQ.

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(Telephone conference.)

THE COURTROOM DEPUTY: Civil cause for motion hearing, 21-CV_3703, Khusenov vs. Procraft Inc.

Counsel state your name for the record, beginning with plaintiff counsel.

THE COURT: We're still waiting for plaintiff counsel. Is defendant's counsel on the phone?

MS. VASQUEZ: Yes, your Honor.

THE COURT: Who is that, please?

MS. VASQUEZ: Carmen Vasquez on behalf of Procraft and Procut.

THE COURT: And?

MR. EVANS: And for the third-party defendant, Thomas Evans.

THE COURT: And I understand plaintiff's counsel just joined the call.

MR. ZOHAR: Yes, your Honor. Gil Zohar for the plaintiff. I apologize.

THE COURT: Okay. What I'm not understanding about your request to extend discovery is why you need expert depositions in order to make a dispositive motion. Why would you do that? If you have two experts, one from each side, and one says one thing and one says the other thing, and each of them are based on factual assumptions made from evidence in the record, how could I possibly grant summary judgment?

Who is the main proponent -- I understand it's on consent -- who is the main proponent for this motion, defendant or plaintiff?

MS. VASQUEZ: Defendant, your Honor. Defendant Procraft. We will probably be moving for summary judgment, almost certainly. And we didn't ask for an extension of discovery deadline necessarily. I understood from your rules that we have to submit the request for dispositive motion conference by May 6, and by May 6 we will not have completed expert discovery.

THE COURT: Right.

MS. VASQUEZ: We will not have yet completed the exchange of the reports or the depositions. And so based on your rules, the letter request is a three-page letter which outlines our motion in essence, it's going to be an opportunity to orally argue our position.

THE COURT: Right.

MS. VASQUEZ: Without having expert discovery completed by May 6, it will be very difficult to submit to the Court a detailed letter with our position not knowing even plaintiff's position at the time.

THE COURT: Well, it seems to me like you're planning on moving for summary judgment without even knowing if you've got a viable summary judgment motion.

Let me go back what I said in the beginning. Let's

suppose we do it your way and wait until July 13 when you finish expert discovery. And then you send me a letter that says we'd like to move for summary judgment. We do that because, what? What is the possible ground for summary judgment?

MS. VASQUEZ: Lack of design defect.

THE COURT: Okay. By July 13 the plaintiff is going to have an expert saying there is a design defect. And you're going to have an expert that says there isn't a design defect. And so how is that a dispositive motion? I can't choose between experts on summary judgment, can I?

MS. VASQUEZ: Right now I don't necessarily know what the plaintiff's expert is even going to say, your Honor. That's part of the issue, that I don't know if there is no expert from plaintiff's counsel side yet. We haven't exchanged any expert information yet so I don't know that there will be an expert from plaintiff saying that.

THE COURT: If the plaintiff had no expert, then it seems to me the only way plaintiff can oppose your motion is to say that your expert is basing his opinion or her opinion on facts that are not supported by any evidence in the record. But for you to make it -- all I'm saying is the expert opinion seems to be irrelevant to the issue of whether there is a dispositive motion. Because you can't really grant summary judgment when there is conflicting expert affidavit. And if

the plaintiff can't contradict your expert's affidavit and there is facts in the record to back up your expert, well, then the plaintiff loses.

MR. EVANS: If I may. I think where counsel is going on this is, it doesn't -- you are correct, it may not necessarily matter about expert discovery. I think it really is going to hinge upon the law and the facts of the case and the experts may be entirely irrelevant. Because we know from the facts of this particular case that the safety guard that was on the machine, on the meat grinder, was a fixed guard. It was removed by the butchers in the butchers' department for efficiency reasons relating to placing and being able to place meat efficiently in the meat grinder.

I think what defense counsel going on it is, we had manufactured or distributed a safe product, that according to the experts would be the way that you would do it for this machine, making it a unremovable guard. The only way this thing was removed was by grinder of some kind.

THE COURT: The facts you're giving me are virtually undisputed; it's just the conclusion of whether or not the potential for removal of the guard was itself a defect. In other words, you should have made a guard that the machine couldn't operate at all if somebody removed it, otherwise you're just inviting people to put their hands it.

Look, I understand. I'm not saying I'm making a

finding. I'm just trying to understand the parties' theories.

What I can't understand is unless the plaintiff gives up, how could we have a dispositive motion based on an affidavit from the defendant's expert that says in effect, a report from the defendant's expert, that says in effect this machine was made with a guard and because it had a guard there was no defect. Then the plaintiff comes back with an expert and says, yes, plaintiff's expert claims there was a guard but the defense knew or should have known that it was readily removable. Then how do I grant summary judgment?

MR. EVANS: Well, I think in that scenario you really get into all the things that would be part of the motion for summary judgment; namely, what is the standard within the meat grinding manufacturing business in terms of what the plaintiff's expert say should have been there versus what the defendant's have done in terms of making this as safe as possible. In other words, there are no other manufactures that make these machines with some sort of sensors on it that if the guard is removed it's not going to operate. It doesn't exist. I think that's where defense going on it, on the design basis.

You can't ask for something or say that it's a negligent design or manufacture, when in the real world it doesn't exist.

THE COURT: Okay. I understand that's a theory,

maybe it's a theory that will win the case for the defendants.

Let's assume for the purposes of argument that the plaintiff is going to concede that there are 20 manufacturers of these slicing devices out there and none of them have any fail-safe mechanism that would prevent the guard from being removed. But plaintiff's expert says it would cost 35 cents per machine to install such a device. If that's what happens, how do I grant summary judgment?

MR. EVANS: Then that's a consumer-based issue, because if it adds to the price of the machine in any significant way, nobody is going to purchase the thing.

THE COURT: That's why I said 35 cents, I could have said three cents. I think this --

MR. EVANS: I think this is several hundred dollars in this particular scenario.

THE COURT: What the defendant needs to move for summary judgment is an affidavit from an expert that says there are 20 manufacturers out there, none of them have a fail-safe mechanism, and it is not economically feasible to have.

MR. EVANS: Correct.

THE COURT: And then first of all, let me ask defense counsel, do you anticipate having such an expert?

MS. VASQUEZ: We do.

THE COURT: And then what is the plaintiff going to

say, I'm asking when Mr. Zohar, you're faced with that affidavit.

MR. ZOHAR: That is our argument. And also failure to warn. Two prongs here.

Absolutely, with regard to putting out a product that maybe initially when they started making these machines, 50, 60, years ago, they didn't have the ability to make microchips do things of those nature. It is easy to do now, it does not cost much. That is one of the prongs of liability upon the manufacturer.

THE COURT: Are you going to have an expert who says that?

MR. ZOHAR: I'm going to have an expert. I do not have a report, but yes, that's definitely one of the things that we're looking at.

THE COURT: Let me ask defendant and third-party defendant, if I've got those reports, how do I grant summary judgment?

MR. EVANS: Carmen, I'll leave that up to you on the case law.

MS. VASQUEZ: The case law is pretty clear on the issue of a machine that was altered after it left possession of a distributor/manufacturer, and the duty and responsibility of the manufacturer don't extend past when they build it; unless they were aware of the fact that the guards are being

removed on a regular basis. According to the testimony of our witness who testified, he had no knowledge of it being removed.

THE COURT: I understand. All I'm saying is you don't need an expert for that. You think the case law says that an alteration absolves you of responsibility for injuries. It's currently, right now, between all of us, it's undisputed that somebody other than defendant removed it. You could make your summary judgment motion right now, you don't need an expert or anything else.

You can say, look at this case law, Judge. Here is my 56.1 statement. It says defendants did not remove the guard. Plaintiffs admit that. And that is enough under the case law.

What does that have to do with expert discovery?

MS. VASQUEZ: Because plaintiff is going to come back with an expert saying they could have made it safe or done this or that. And my expert will say actually that's not accurate.

THE COURT: You lose, because you have a conflict between the experts. It will be a factual issue of the jury as to whether it could have been feasibly and reasonably done.

You told me just now that you're going to get out of this case because the case law says once the guard is removed you're off. Now you're saying, no, plaintiff's theory is

going to be that if it's easily remediable then the defendant is still liable. If it is known and foreseeable that people take this off, the defendant is still liable.

Then you're going come back with your expert who says their expert is wrong. Where is the summary judgment?

MS. VASQUEZ: Only because there are nuances to the case, your Honor.

This is not just a standard grinder with a removable guard. This is a guard that was a permanently affixed feature on this grinder. Our expert will be able to testify and say and give an affidavit that actually says, for a meat grinder with a permanently affixed safety guard there was no requirement to have a sensor or interlock or any other kind of system.

THE COURT: I understand.

Mr. Zohar says he's going to come back with an expert that says this could have been done easily and cheaply; it was only to save a nickel that the defendant didn't do that. Then your expert will be disagreeing with Mr. Zohar's expert.

MR. ZOHAR: I get what you're saying, Judge, because if you're going to rely on the case law as it stands now factually, you just make the motion for summary judgment.

THE COURT: Exactly.

MR. ZOHAR: The issue of expert discovery really is

a battle of the experts, if the motion is denied. And we now have to go to trial and the experts will testify as to such.

But I think on the case law that's currently out there, you are correct, I think defendant could move for summary judgment based on what is currently out there in the case law.

THE COURT: I'm going to give you the time that you asked for, no more. We're going to finish the expert reports -- expert depositions -- if you want, which I presume you will, on July 13.

Then by July 20, I'll get a letter from the defendants that they want to move for summary judgment.

Now, I want to caution the defendants. If you send me that letter, you better have anticipated where the plaintiff's expert is. We're going to have another conversation in connection with those letters and I'm going to press you even harder than I have today about how there is a summary judgment motion in lieu of conflicting expert affidavits. If you say to me, well, Judge, we're not relying on the expert affidavits because the law is so much in our favor that the fact that it was removed by itself is enough to get us out; then I'm going to say to you, then you should have moved for summary judgment before everyone went to the expense of getting experts. And probably I'm going to say, you're too late to move for summary judgment. And let's go to trial,

which we'll do a week later. That's the lay of the land.

I'm granting your motion for an extension. But I'm cautioning you to be very careful and thoughtful about what tactics you'll use to tee this case up. If you're going to make a motion based solely on the case law, make it now, because the facts are not in dispute.

If you're going to make it based on an expert report, consider whether you really are going to be able to do that when Mr. Zohar puts in an affidavit saying the opposite of what your expert does.

MS. VASQUEZ: If we make this motion now, your Honor, when you say "now," what exactly does that mean?

THE COURT: How long do you need to make one based on the case law with no expert support?

MS. VASQUEZ: At least 30 days, I would ask for.

THE COURT: You were going to say three weeks before I said three weeks, but that's okay. You can have 30 days.

Mr. Zohar, I don't want to give you 30 days to oppose. I don't think you need it. Do you think you need it?

MR. ZOHAR: I would want as much time as possible. I don't want to shoot myself in the foot and then coming back to you requesting more time.

THE COURT: Here's what I'll do, I'll give you three weeks to oppose. However, I'm going to look at the defendant's papers the day they come in. If I see it's really

mammoth and you've got to do a lot of work, I won't hesitate to give you an additional week or two. In fact, you should remind me that I said this during this conference so I'll be sure to give it to you if you need it.

MR. ZOHAR: Will do.

THE COURT: Then ten days for reply.

That will give us a motion that is teed up well before you've completed expert discovery, which like I say, seems fine to me because the experts don't get you summary judgment any way.

Let's give that a try. If someone thinks of something after this call, if you have thoughts in the stairwell that make this plan intreasable, then you'll write another letter and let me know why.

I think the defendants ought to be thinking very carefully whether the case law is strong enough to go ahead and make this motion. If it is, by all means make it. But if there is things that are factual disputes before you get to the point of removing the guard is not foreseeable, then don't make it.

MS. VASQUEZ: Your Honor, in terms of expert discovery, if we decide to go that route before making the motion, we have the extension then to what date specifically? I want to make sure I know.

THE COURT: I think the way it works out on your

proposed schedule was July 13 conclusion of expert deposition. Let's give that a try. I'm not writing it in granite, I'm writing it in sandstone because I know I caught you off-guard about how I see the case, if I'm right. If I'm not, you'll let me know.

MS. VASQUEZ: Thank you, your Honor.

THE COURT: Thank you all for calling in.

MR. ZOHAR: Thank you.

(Whereupon, the matter was concluded.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Rivka Teich
Rivka Teich, CSR RPR RMR FCRR
Official Court Reporter
Eastern District of New York